

## **REMARKS/ARGUMENTS**

Claims 1-28 are pending and have been presented for examination on the merits. The claims have all been rejected. Reconsideration of the application is respectfully requested.

In ¶6 of the Office Action claims 1-6, 8, 12, 15-16 and 24-26 are rejected under 35 U.S.C. 102(b) as anticipated by, or in the alternative under 35 U.S.C. 103(a) as obvious over, U.S. Patent No. 4,321,087 to Levine et al. (“Levine”) as evidenced by Seubert et al., “PVD Aluminum Pigments: Superior Brilliance for Coatings & Graphic Arts” (“Seubert”). The rejection is respectfully traversed.

In response to the above-indicated rejection, applicants respectfully direct the Examiner’s attention to the fact that claims 1 through 26 and 28 are directed to a cosmetic composition. Furthermore, claim 27 is directed to an artificial fingernail. The Levine reference is believed to be non-analogous art to the presently claimed compositions/fingernail. That is, Levine et al. is directed to a different field of art than that which is presently claimed, and furthermore, it is not attempting to solve the same problem resolved by the presently claimed invention, i.e., the provision of an improved cosmetic composition/fingernail. The Levine reference is, in fact, completely silent as regards either cosmetic compositions or artificial fingernails.

It appears that the Examiner has inferred from the Assignee identified on the face of the reference, i.e., Revlon, Inc., that the Levine patent is directed to a cosmetic composition. Along these lines, the Examiner cites to, for example, Examples 9 and 10 of Levine et al. However, Example 9 is directed to a printing ink, not a cosmetic composition. In like manner, Example 10 is directed to a spray lacquer, again not a cosmetic composition. Applicant respectfully submits that the Examiner should have focused on the subject matter disclosed in the reference and not on the Assignee of the reference. That is, as demonstrated above, notwithstanding that the subject reference is assigned on its face to Revlon, Inc., it is directed to subject matter that is non-analogous to that which is presently recited in applicants’ claims, nor does it attempt to solve the same problem(s) solved by applicants’ claimed composition and fingernail.

Further to the above, in the paragraph bridging pp. 3-4 of the Office Action the Examiner asserts that the diffractive structures of the pigment incorporated into the claimed cosmetic composition are inherent in the disclosure of Levine et al. Applicants, however, respectfully

disagree. That is, the Levine et al. reference is directed to a process for preparing PVD pigments (i.e., not cosmetic compositions or artificial fingernails). The PVD pigments produced as per Levine et al. are ‘mirror-like’, i.e., they have a nearly uniform and perfect surface. One having an ordinary level of skill in this field of art would not find it disclosed, or even suggested in Levine et al. to obtain PVD pigments having diffractive structures, i.e., as recited in applicants’ claims.

With regard to such diffractive structures, the Examiner cites (see Office Action p. 4) to the Seubert reference, pp. 4-6. Seubert et al. illustrates the differences between aluminum pigments obtained by ball milling, i.e., referred to as “conventional pigments” and aluminum pigments obtained by physical vapor deposition, i.e., referred to as “PVDA-pigments”. Seubert et al. teaches that PVDA pigments are extremely thin pigments having a nearly uniform surface without many visible edges which may act to scatter light impinging thereon. On the contrary, ‘conventional’ pigments obtained by ball milling, as schematically shown at the top of p. 2 in the reference, have a rough and structured surface leading to disordered reflection and scattering, thus producing a less brilliant effect - i.e., as explained at p. 6 of the subject reference. As may be seen from a review of the subject reference, the rough and structured surface found on aluminum pigments obtained by ball milling has nothing in common with PVD aluminum pigments having a diffractive surface

A diffractive surface acts like an optical grating. It leads to a diffraction of light impinging on the pigment, resulting in a multi-color flop. Aluminum pigments obtained by ball milling, however, do not cause light to be diffracted. Instead, their use merely results in a disordered reflection and scattering, i.e., as illustrated at p. 6 of the reference in the picture at the top of the left-hand column. The illustration, however, at the top of the right-hand column on the same page shows, in contrast, the smooth surface found in PVD aluminum pigments - leading to a uniform reflection having a brilliant mirror-like effect.

In summary, therefore, neither the Levine et al. reference, nor the Seubert et al reference disclose aluminum pigments with diffractive structures, i.e., having an optical grating. Thus the subject matter recited in applicants’ claims 1-6, 8, 12, 15-16 and 24-26 is entirely novel over both Levine et al. and Seubert et al., taken alone or in combination.

Furthermore, one having an ordinary level of skill in the relevant art would not obtain,

from the teachings contained in either, or both, of Levine et al. and/or Seubert et al., any suggestion to use PVD aluminum pigments having diffractive structures in a cosmetic composition. As explained, for example, at p. 12, lines 30-32 of applicants' specification as filed, applicants have surprisingly determined that the risk of agglomeration is considerably reduced when using PVD aluminum pigments having diffractive structures, such as those that are presently claimed. As indicated, moreover, at the top of specification p. 13, the skilled artisan would expect the aluminum pigments to agglomerate when placed in a medium having an increased viscosity. Due, however, to the diffractive structures, the risk of agglomeration is significantly and unexpectedly reduced. The diffractive structures thus do not merely produce an optical effect; they additionally counteract the agglomeration that would otherwise be expected. This surprising and unexpected result could not have been deduced from the disclosure contained in Levine et al. or Seubert et al., whether taken individually or in combination. The unexpected improvement achieved with the use of applicants' claimed pigments thus further evidences the non-obviousness of applicants' claims.

For the reasons presented above, the Examiner is respectfully requested to reconsider and withdraw the rejection of applicants' claims 1-6, 8, 12, 15-15 and 24-26 under 35 U.S.C. 102/103.

In ¶7 of the Office Action, claims 7, 9-11, 13-14, 18, 21-22 and 27-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over the '087 Levine patent as applied to claims 1-6, 8, 12, 15-16 and 24-26 and further in view of Published U.S. Patent Application No. 2-3/0175225 of Leacock et al. ("Leacock"). This rejection is also respectfully traversed.

It is noted that the claims as identified above under rejection all depend, directly or indirectly, from claim 1 and thus they include all of the features recited in the subject claim. As demonstrated by the remarks set forth above, claim 1 is deemed to be distinguishable over Levine et al.. Thus the claims which depend from claim 1 are also believed to be distinguishable over the subject reference for the same reasons as given above. The above remarks are, thus, specifically incorporated by reference into the present discussion.

As indicated, however, the present rejection additionally includes the published U.S. patent application of Leacock et al. However, the Leacock et al. reference entirely fails to

remedy the deficiencies, noted above, of the Levine et al. reference. Leacock et al. discloses a nail enamel composition containing pearlescent effect pigments, i.e., silicon dioxide platelets coated with metal oxide. The composition may, in addition, contain aluminum platelets. The optical effect of a combination of pearlescent pigments and aluminum effect pigments is that the nail enamel shows an optical effect of pearlescent pigments over a metallic background (see, e.g., Leacock et al. paragraph [0008]). The pearlescent effect obtained by coating silicon dioxide with a metal oxide is caused by generating interference colors at the thin layers. This is a completely different physical effect than the diffraction of light by a diffractive structure, acting as an optical grating, that is obtained with the PVD-aluminum effect pigments used in the presently claimed cosmetic compositions and artificial fingernail. When using a mixture of pearlescent effect pigments and aluminum platelets, as described in Leacock et al., the interference effect is diminished by the presence of the opaque aluminum effect pigments.

As demonstrated above, therefore, the combination of Levine et al. and Leacock et al. provides no suggestion to one having an ordinary level of skill in this art to utilize only aluminum effect pigments with diffractive structures in a cosmetic composition, e.g., a nail enamel. The optical effect of the PVD-aluminum pigments having diffractive structures is a significant multi-colored flop, which is not diminished by a second pigment. Therefore, the multi-color flop is dominant and has, at the same time, a metallic appearance. Leacock et al. clearly teaches to use a combination of two different types of effect pigments, namely (1) pearlescent pigments to provide multi-color effects, and (2) aluminum effect pigments for purposes of providing a metallic appearance. Nothing in either Levine or Leacock, or in the combination of those two references, would suggest to one having an ordinary level of skill in this art to use only aluminum-PVD pigments with diffractive structures (as presently claimed), i.e., which construction assists in preventing undesirable side effects which it is preferred to avoid in the case of cosmetics which contact human skin.

Further to the above, Applicants desire to stress to the Examiner that PVD-aluminum pigments having diffractive structures are not merely regular PVD pigments of the type obtained by following the teaching of Levine et al. By following the teaching of Levine one of ordinary skill in the relevant art will obtain, in contrast to the pigments claimed by applicants, only PVD-

aluminum pigments having a homogeneous thickness and hardly any surface defects (see, e.g. the explanation in Seubert et al. with reference to Fig. 12). Moreover, when one uses a mixture of pearlescent effect pigments and aluminum effect pigments, i.e., as taught by Leacock et al., it is required to use a suspending agent, which does not form a part of the presently claimed composition, in order to avoid agglomeration of the effect pigments. Such a suspending agent is not required in the present invention since, as noted above, as explained in the present specification the risk of agglomeration is significantly reduced with the use of applicants' claimed compositions.

The Examiner is, therefore, respectfully requested to reconsider and withdraw the rejection of applicants' claims 7, 9-11, 13-14, 18, 21-22 and 27-28 under 35 U.S.C. 103 over the combination of Levine et al. and Leacock et al.

Furthermore, in ¶8 of the Office Action, claims 17, 19, 20 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over the '087 Levine patent as applied to claims 1-6, 8, 12, 15-16 and 24-26 and further in view of U.S. Patent No. 6,042,842 to Lemann et al. ("Lemann"). The rejection is also respectfully traversed.

Applicants note that the claims involved in the subject rejection all depend (indirectly) upon claim 1. Thus the subject claims include all of the features recited in claim 1. Claim 1 (and thus those claims which depend therefrom) are clearly distinguishable over the Levine et al. reference (for the reasons presented above) and applicants' remarks with regard thereto are specifically incorporated by reference into the present discussion. The Lemann et al. reference, moreover, which is combined with Levine et al. to reject claims 17, 19, 20 and 23 does not cure the deficiencies of Levine et al. In fact, Lemann et al. is entirely silent concerning the use of aluminum effect pigments in cosmetic compositions (i.e., as presently claimed by applicants). Applicants thus submit that neither Levine et al. or Lemann et al. taken by themselves, or even in combination, would teach or suggest the cosmetic compositions recited in any of claims 17, 19, 20 and/or 23.

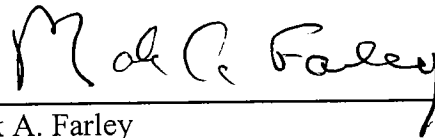
For the reasons above, therefore, the Examiner is respectfully requested to reconsider and withdraw the rejection under 35 U.S.C. 103 of applicants' claims 17, 19, 20 and 23.

Summary

Based on the reasons presented above, applicants' claims are all believed to be distinguishable over the prior art cited by the Examiner and the Examiner, therefore, is respectfully requested to reconsider and withdraw the §§102 & 103 rejections of the subject claims and to, thereby, issue a Notice of Allowance for the entire application.

Respectfully submitted,

THIS CORRESPONDENCE IS BEING  
SUBMITTED ELECTRONICALLY THROUGH  
THE PATENT AND TRADEMARK OFFICE  
EFS FILING SYSTEM ON January 4, 2010.



---

Mark A. Farley  
Registration No.: 33,170  
OSTROLENK FABER LLP  
1180 Avenue of the Americas  
New York, New York 10036-8403  
Telephone: (212) 382-0700

MAF:stb